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Wade H. McCree, Jr.--In Tribute

Erwin N. Griswold
Partner, Jones, Day, Reavis & Pogue

WADE H. McCREE, JR. — IN TRIBUTE

Erwin N. Griswold *

It is hard to think or write about Wade McCree in the past tense. He was only sixty-seven years old when he died, yet he had cut a wide swath in his professional career, filling a succession of important posts with distinction. My acquaintance with him covered his whole adult life. I have lost a greatly admired friend. Wade was an able lawyer, but above and beyond that he was a fine person, forceful but soft-spoken, kind, warm, energetic, responsive — and always a gentleman. He enriched all those who knew him, and made important contributions in all his endeavors.

Wade McCree was born in Iowa in 1920. He took his A.B. at Fisk University in 1941, and then came to the Harvard Law School, where I first knew him. His legal education was interrupted by military service, in which he spent four years, and became a captain. He returned to law school in 1946, and received the LL.B. degree in 1948 — as of the Class of 1944. Harvard recognized his great distinction by awarding him the LL.D. degree in 1969, before he was fifty. Altogether he received at least thirty honorary degrees.

On leaving law school in 1948, Wade found employment in Detroit, where he quickly made his mark. He became a member of the Michigan Workmen's Compensation Commission in 1951. In 1954, he was appointed a Circuit Judge in Wayne County, Michigan, where he served until 1961, when he was appointed to the bench of the United States District Court in Michigan by President Kennedy. In 1966, he was promoted to the United States Court of Appeals for the Sixth Circuit by President Johnson, and he served there with distinction for eleven years. In 1977, he came to Washington as Solicitor General by appointment of President Carter. He filled that office for four years, and then entered law teaching as a professor at the University of Michigan Law School.

Although our contacts were relatively few, except for the period of his four years in Washington, I followed his work with great interest, and with deep recognition of the importance of the contribution he was making. I remember with especial warmth a time, probably about 1966, when I invited him to come to Cambridge as one of the judges at

* Partner, Jones, Day, Reavis & Pogue, Washington, D.C. Solicitor General of the United States, 1967-1973; Dean of the Harvard Law School, 1946-1967. — Ed.

an argument in the Ames Competition, which is the culmination of the Harvard Law School's moot court system. I learned that Wade's parents lived in Boston, and they were invited to attend the dinner which preceded the argument, as well as the argument itself. The love and respect that Wade had for his parents, as well as their pride in him, were very apparent, and shed a sort of blessing over the entire proceeding. It has remained a bright spot in my memory. Indeed, all my contacts with Wade over more than forty years were bright spots. He was that kind of person.

After his law school days, the period when I had closest contact with Wade was the four years when he was Solicitor General. I entered that office as a young lawyer in 1929, and served as its head from 1967 to 1973. Like a number of others, I developed a special interest in that remarkable office. As is well known, the Solicitor General is the "barrister" for the United States before the Supreme Court. He is responsible for all the government's cases there. He is also the officer who decides whether any case the government loses in any court will be appealed or not — this being the only substantial point of coordination of the government's manifold adventures in litigation.

There are two aspects of the office which I always wanted to discuss with Wade, and always thought I would — some time when we got around to it. One of these matters is: Who is the client of the Solicitor General? Is it the officer or agency whose case is before the Court? Or is it the President — or the United States — or the people — or "the law"?[1] The other matter is the "independence" of the Solicitor General. As former Solicitor General Archibald Cox has recently written, "the Office of the Solicitor General prided itself on a long tradition of professional independence and helpfulness to the Court, even at some cost to the litigation position of the United States or to the political needs of the President."[2] There is this tradition, and Solicitors General endeavor to preserve it. Yet the Solicitor General is not and cannot be wholly independent. He is a subordinate of the President and of the Attorney General, and can be (and has been) removed by the President at his pleasure. Nor can it be said that the Solicitor General's office is not "political." He holds his office by nomination of the President, and appointment after confirmation by the Senate. He is a part of the structure of government, which is political in the highest sense.

Even in the exercise of independence, Solicitors General have en-

1. *Cf.* Josephson & Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 How. L.J. 539 (1986).

2. A. Cox, The Court and the Constitution 296 (1987).

deavored to avoid the creation of political and other problems for the President, and to keep the Attorney General informed of important matters, so that he will not be caught unawares. Indeed, much of the role of the Solicitor General depends on the attitude of the Attorney General. Most Attorneys General have recognized the importance of the Solicitor General's determinations in advancing the interests of the United States, and have given the Solicitor General firm and effective support.

Wade McCree undoubtedly confronted problems of this sort, but he handled them in his quiet way, so that he was rarely the subject of newspaper comment. One episode has been given publicity, by former Attorney General Griffin B. Bell, and is relevant here. It arose in connection with the Solicitor General's brief *amicus curiae* in the *Bakke* case.[3] While McCree was developing his position, Attorney General Bell took to the White House a copy of an initial draft of the brief. Of this, Attorney General Bell has written,

> I then made perhaps my greatest mistake with regard to the power centers at the White House. . . . If the staff had its way, no doubt every major issue that naturally fell to the Justice Department would be considered policy rather than a legal matter. Then the White House would be making all the decisions, because it is the White House where policy is made.
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> My mistake was in taking a copy of the draft friend-of-the-court brief with me to the White House . . . .[4]

As Attorney General Bell shows, the result was a rather widespread tug of war. The President's counsel, the Chief of the Domestic Policy staff, the Vice President, and the Secretary of Health, Education, and Welfare all became involved. A copy of the draft was leaked to the *New York Times,* and this produced an even wider reaction, from actors including the Congressional Black Caucus. As the Attorney General says: "Clearly and simply, there were attempts to pressure us."[5] This seems an understatement.

But Wade McCree received the full support of the Attorney General, who withheld any mention of comments made by the Vice President. As the Attorney General wrote: "The pressure on him [McCree] was heavy enough without adding the weight of one of the White House's centers of power."[6] Bell skillfully handled relations at the White House, and the brief was filed as it was prepared by McCree, with the active participation of Drew S. Days III, the Assistant

3. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

4. G. BELL, TAKING CARE OF THE LAW 29-30 (1982).

5. *Id.* at 31.

6. *Id.*

Attorney General for the Civil Rights Division.[7]

A number of years later, Wade McCree said in an interview:

> I talked regularly with the Attorney General about Bakke, but I never received, directly or indirectly, a statement that the White House wanted me to do this or that. I suspect Beil did. I didn't know it at the time. But whatever directions he received he didn't transmit to me as an order. Which says to me that he wasn't *told* to tell me, because I'm certain he would have. Bell is too well disciplined a person. If the President had said, "Tell McCree to do thus and so," I'm sure Bell would have.[8]

Through all of this, Wade McCree went quietly about his job. He made no public statements. He had a hard professional task to do, and he performed it with dignity and skill. He was fortunate to have the support of a strong Attorney General. The "independence" of his office was well preserved.

All of this led, a few months after the *Bakke* case was decided, to the issuance of an important policy statement by the Office of Legal Counsel in the Department of Justice.[9] Since Wade McCree played an important part in the background of this opinion, it is relevant to quote here a summary of its conclusion:

> "The purpose of this memorandum," it began, "is to discuss (1) the institutional relationship between the Attorney General and the Solicitor General, and (2) the role that each should play in formulating and presenting the Government's position in litigation before the Supreme Court."
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> The memo settled the first issue quickly. "The short of the matter," it concluded, "is that under our law the Attorney General has the power and the right to 'conduct and argue' the Government's case in any court of the United States" — and the Solicitor General worked for the AG. But the answer to the second issue lurked in tradition as much as law, and it was harder to pin down. The SG had enjoyed "independence" within the Justice Department and within the Executive Branch. He was not "bound" by the views of his "clients" within the government, and he was free to confess error, rewrite briefs, and turn down requests for petitions to the Supreme Court for four reasons: "The Solicitor General must coordinate conflicting views within the Executive Branch; he must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones; he must assist in the orderly development of decisional law; and he must 'do justice' — that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court."
>
> Why couldn't the Attorney General do the same? Because his political responsibilities might "cloud a clear vision of what the law re-

7. The matter is more fully discussed in L. CAPLAN, THE TENTH JUSTICE 39-48 (1987).

8. *Id.* at 46-47 (emphasis in original).

9. 1 U.S. DEPT. OF JUSTICE, OPINIONS OF THE OFFICE OF LEGAL COUNSEL 228 (1977).

> quires." In the memo's words, "For this reason alone, in our view, the tradition of the 'independent' Solicitor General is a wise tradition." In the small number of cases that arose amidst political controversy, the Attorney General could strengthen the SG's independence by taking responsibility for the final judgment on the government's position and shielding the SG from political pressure. By preserving the Solicitor General's independence, the Attorney General enhanced the SG's ability to serve as "an officer learned in the law."[10]

Leaving the Solicitor General's office in 1981, Wade McCree went to the faculty of the University of Michigan Law School, thus bringing to legal education the fruits of his broad and distinguished career. We were hoping that he would be at Michigan for many more years. He was a great lawyer, a fine judge, an able public servant, and a tonic to all who knew him. But perhaps most of all he was a warm human being who received merited respect and sincere affection from his many friends.

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10. L. CAPLAN, *supra* note 7, at 48-49 (footnote omitted).